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Docket: 15-CRB-0010-CA-S (SPORTS RULE PROCEEDING)
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**Before the**
**COPYRIGHT ROYALTY JUDGES**
**Washington, D.C.**

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| ***In re*** | ) | |
| | ) | |
| | ) | **Docket No. 15-CRB-0010-CA-S** |
| **ADJUSTMENT OF CABLE STATUTORY LICENSE ROYALTY RATES** | ) | **(Sports Rule Proceeding)** |
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| | ) | |

**SURREPLY COMMENTS**
**OF THE PARTICIPATING PARTIES**

The Joint Sports Claimants ("JSC"),[1] NCTA−The Internet & Television Association ("NCTA") and American Cable Association ("ACA") (collectively, the "Participating Parties"), the only parties who have filed notices of intent to participate in this proceeding, submit the following Surreply Comments in response to the Copyright Royalty Judges' ("Judges") notice published at 82 Fed. Reg. 44,368 (Sept. 22, 2017) ("Notice").

The Notice requested all interested persons to submit reply comments and surreply comments concerning the rules to which the Participating Parties had agreed and proposed (as corrected) to the Judges for adoption in full settlement of this rate adjustment proceeding (the "Proposed Rules"). The only reply comments filed in response to the Notice, other than those filed by the Participating Parties, came from Major League Soccer, L.L.C. ("MLS").[2] The Participating Parties' Surreply makes two points. First, MLS has failed to demonstrate that the Proposed Rules are contrary to the provisions of the applicable Section 111 license or other

[1] "JSC" refers collectively to the Office of the Commissioner of Baseball, National Football League, National Basketball Association, Women's National Basketball Association, National Hockey League and National Collegiate Athletic Association.

[2] *See* Reply Comments of Major League Soccer, L.L.C., No. 15-CRB-0010-CA-S (Oct. 23, 2017) ("MLS Reply").

statutory law. Second, adoption of MLS's recommended modification to the Proposed Rules would not "protect the integrity" of the Judges' rules and "treat all copyright owners equitably," as MLS suggests, but would be at odds with the statutory framework applicable to this proceeding.

**1. MLS Has Not Demonstrated That the Proposed Rules Are Contrary to the Applicable Section 111 License or Any Other Statutory Law.**

In their Notice, the Judges identified the central issue as whether the Proposed Rules are contrary to the Section 111 license or other statutory law.[3] The Participating Parties' reply comments reviewed in detail the relevant precedent and statutory provisions and demonstrated that there is no conflict between the Proposed Rules and anything in Section 111 or in Section 801(b)(2)(C) of the Copyright Act, which authorizes the rate adjustment at issue in this proceeding.[4] On the other hand, MLS – despite being given a second opportunity to make the case that the Proposed Rules are somehow contrary to law – again failed to identify any provision of statutory law that would be violated by the adoption of the Proposed Rules.

MLS complains that the Proposed Rules' definition of surcharge-eligible sporting events unfairly "exclude[s]" MLS and other "similarly situated" entities.[5] This "discriminatory definition," MLS alleges, is contrary to the Section 111 statutory license because it results in a rate adjustment that is "too narrowly tailored."[6] Yet, MLS cites no specific language in Section 111 or anywhere else in the Copyright Act barring the establishment of a rate adjustment under Section 801(b)(2)(C) that applies only to a particular subset of copyright owners, such as those

[3] Notice, 82 Fed. Reg. at 44,369.

[4] *See generally* Reply Comments of the Participating Parties, Docket No. 15-CRB-0010-CA-S (Oct. 23, 2017) ("Participating Parties Reply").

[5] MLS Reply at 2.

[6] *Id*. at 3.

who incurred the expense of seeking, negotiating and litigating a rate adjustment in the first instance. As the Participating Parties explained in their reply comments, Section 801(b)(7)(A) of the Copyright Act expressly provides for the adoption of settlements among only "some" of the participants to a proceeding.[7] Furthermore, there is ample precedent for setting statutory license rates and terms that distinguish among groups of copyright users or copyright owners.[8] In sum, there is no inconsistency between the Proposed Rules and the Section 111 license or any applicable statute.[9]

**2. Adoption of MLS's Suggested Modification to the Proposed Rules Would Be Contrary to the Statutory Framework Governing This Proceeding.**

As indicated above, the crux of MLS's objection to the Proposed Rules is that the definition of surcharge-eligible sporting events is discriminatory because it does not include MLS and other entities whose programming may "fall under the JSC definition" for purposes of a wholly different proceeding – the Allocation Phase in 2010-13 cable royalty distribution

[7] Participating Parties Reply at 8 (citing 17 U.S.C. § 801(b)(7)(A)). MLS, of course, was not a participant. Had it been a participant, it would have been required to litigate regarding whatever rate adjustment it sought for it and other copyright owners not bound by the agreement among JSC, NCTA, and ACA. There is nothing to suggest that Congress intended a non-participant such as MLS to have greater rights with respect to a settlement than participants. Indeed, the statute makes clear that only participants have the right to object to their exclusion from rates and terms established via a settlement agreement that binds such participants.

[8] Under the syndicated exclusivity surcharge, also adopted pursuant to Section 801(b)(2)(C), different schedules of rates apply to cable operators based on the size of the market in which they are located and the proceeds of this surcharge are distributed to a subset of copyright owners. *See* Participating Parties Reply at 6 n. 6. *See also id*. at 9 n.9 (citing, *inter alia*, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 80 Fed. Reg. 58,201, 58,203 (Sept. 28, 2015) (adopting settlement agreement establishing rates for certain internet transmissions by college radio station and noncommercial webcasters)).

[9] MLS also makes the puzzling argument that, unless the Proposed Rules are expanded to include MLS, "[e]ligible claimants will not have the financial resources to track down Form 3 cable system operators to enforce their surcharge fees." MLS Reply at 7. This "policy" argument has no bearing on the legal issue before Judges. It also demonstrates MLS's misunderstanding of the Proposed Rules, which require each copyright holder to provide each "covered cable system" the same type of "advance written notice" that was required by the former FCC sports blackout rule. MLS's misconception may stem from a lack of experience with former FCC rule, which MLS does not claim to have ever invoked during the four decades that the rule was in force.

proceedings.[10] As its proposed remedy for this alleged discrimination against all such entities, MLS has recommended that the Judges modify the Proposed Rules to accord MLS events alone the same status as surcharge-eligible professional sporting events (*i.e.*, events involving teams affiliated with Major League Baseball, the National Football League, the National Hockey League, the National Basketball Association, or the Women's National Basketball Association).[11] MLS suggests that doing so will "protect the integrity of the [Judges'] rules" and treat "all copyright owners equitably."[12]

To the contrary, amending the Proposed Rules as MLS suggests would contravene the statutory framework governing this rate adjustment proceeding, which contemplates negotiated settlements by those who comply with the requirements to participate in this proceeding. The relevant inquiry in a rate adjustment proceeding initiated pursuant to Section 801(b)(2)(C) should not be whether MLS or any other claimant "fall[s] under the JSC definition" that is used in the distribution proceeding context. Rather, the central concern should be whether, and to what extent, if any, the repeal of the rule has had an impact on such entities.[13] Having chosen not to participate in this proceeding, MLS took no part in the Participating Parties' extensive negotiations and therefore made no showing in those negotiations that MLS has been impacted at all by the repeal of the FCC Sports Rule, let alone that such impact would support any level of

[10] MLS Reply at 4 n.5. MLS has its own counsel in the 2010-13 cable royalty distribution proceeding and is not one of the sports organizations described by the shorthand term "JSC" in that proceeding. As noted in the Supplemental Reply Comments of the Joint Sports Claimants, No. 15-CRB-0010-CA-S (Oct. 23, 2017), the Judges in the 2010-13 cable royalty distribution proceeding have accepted a program category that (somewhat confusingly) also is entitled "Joint Sports Claimants." That category encompasses a broad range of live team sports programming in addition to the programming of the JSC members. *Id.* at 2 n.3. However, MLS has expressly withdrawn any and all claims in the "JSC" category in the 2010-13 cable royalty distribution proceeding. *Id.* at 2-3.

[11] MLS Reply at 8.

[12] MLS Reply at 1.

[13] *See* Participating Parties Reply at 9-10.

surcharge; nor has MLS made any such showing in its reply comments or suggested that it would undertake to do so in a contested proceeding if the Judges rejected the Participating Parties' settlement agreement.[14] MLS simply wants the Judges to declare, *ipse dixit*, that MLS should be the beneficiary of a negotiated agreement to which it played no role in negotiating.

Under the circumstances, the Judges have no basis to modify the Participating Parties' settlement to accord MLS the same treatment as the professional sports leagues that are participants in this proceeding (and more favorable treatment than the collegiate sporting events that are covered by the Proposed Rules).[15] Moreover, there is nothing inequitable about this result. MLS had multiple opportunities to become a participant in this proceeding and thereby be in a position to substantiate its claim that it is "similarly situated" to the Joint Sports Claimants. Notwithstanding MLS's assertion that it was "excluded" from becoming a participant in this proceeding,[16] no one prevented MLS from filing its own petition to initiate a rate adjustment proceeding during the year following the repeal of the FCC Sports Rule. And no one prevented MLS from becoming a participant in this proceeding by filing a timely response to the Federal Register notice published by the Judges in April 2016.[17]

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[14] MLS alleges that it "could be harmed" by the Proposed Rules. And MLS suggests that it would be "inequitable" to require cable systems to "remunerate only certain sports programs." *Id.* at 7. MLS has misconstrued and distorted the effect of the Proposed Rules. As already explained, the Proposed Rules, if adopted, would not impact MLS's ability to seek Basic and 3.75 royalties for the retransmission of any of its telecasts. *See* Participating Parties Reply at 5-6.

[15] *See* Participating Parties Reply at 10 n.10 (discussing the Proposed Rules and collegiate sports events).

[16] There is no merit to MLS's assertion that "MLS was not named as a participant in this proceeding because the JSC Members unilaterally excluded MLS from their coalition . . . ." MLS Reply at 4 n.5. JSC had no power to prevent MLS – which is represented by its own counsel in the cable royalty distribution proceedings – from filing a petition requesting a rate adjustment or a notice of intent to participate in this proceeding initiated in response to JSC's petition for a rate adjustment.

[17] *Adjustment of Cable Statutory License Royalty Rates*, Docket No. 15-CRB-0010-CA, 81 Fed. Reg. 24655, 24656 (April 26, 2016) (setting May 26, 2016 deadline for parties in interest to file a petition to participate in the Sports Rule adjustment proceeding).

MLS's own decisions have put it in the position it finds itself. It should have known that its claim to any substantive relief in this proceeding was dependent on its compliance with the applicable procedural prerequisites enacted into law by Congress.[18] Consequently, the Judges should reject MLS's attempt to get through the back door what it failed to properly seek through the front door.

## CONCLUSION

For the reasons discussed above and in the Participating Parties previously submitted reply comments, awarding MLS its requested relief would be fundamentally at odds with both the letter and spirit of the process governing this proceeding and irreconcilable with the terms negotiated in good faith by the Participating Parties. The Judges should adopt the Proposed Rules in their entirety without modification because (i) they are supported by all parties that filed a timely notice of intent to participate in this proceeding; and (ii) they are not contrary to Section 111 or any other statutory law.

[18] *See, e.g., Universal City Studios, LLLP v. Peters*, 402 F.3d 1238 (D.C. Cir. 2005) (affirming rejection of copyright owner's claim to a share of compulsory license royalty pool where copyright owner filed its claims one day late).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2017, a copy of the foregoing Surreply Comments of the Participating Parties was served electronically and by Federal Express overnight to the following:

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# Certificate of Service

I hereby certify that on Wednesday, November 01, 2017 I provided a true and correct copy of the Surreply to the following:

American Cable Association, represented by Ross J. Lieberman served via U.S. Mail

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Signed: /s/ Robert A Garrett